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No. . . . .
IN THE

Supreme Court of the United States

October Term, 1980

RANCHO LA COSTA,

Petitioner,

vs.

COUNTY OF SAN DIEGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE.

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QUESTION PRESENTED.

Whether protracted governmental conduct, which results in a complete frustration of a property owner's investment expectations, constitutes a taking of private property within the meaning of the Fifth and Fourteenth Amendments.

*The Complaint named the County of San Diego as the only Defendant. No additional parties appeared in this action.

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE.

The petitioner, Rancho La Costa ("RLC"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, entered in this proceeding on October 9, 1980.

Opinion Below.

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, reported at 111 Cal.App.3d 54, appears in the appendix hereto.

Jurisdiction.

The judgment of the California Court of Appeal, Fourth Appellate District, Division One, was entered on October 9, 1980. A timely petition for rehearing was denied by the Court of Appeal on November 7, 1980. A timely petition

for hearing was denied by the California Supreme Court on December 4, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions Involved.

Fifth Amendment, United States Constitution:

> "nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Statement of the Case.

On November 30, 1973, RLC, the Plaintiff and Petitioner herein, filed a complaint in inverse condemnation alleging a taking and damaging by the County of San Diego (hereafter "County") of portions of RLC's property located in north San Diego County in or near the City of Carlsbad, California (C.T. 1).[1] The alleged taking was for a County Public Regional Park known as the Batiquitos Lagoon Regional Park. On April 17, 1974, the County filed its answer to the complaint denying that it was responsible in any manner for a taking or damaging of RLC's property (C.T. 8).

RLC's action against the County proceeded to trial in two phases. The first phase (legal issues trial) commenced on

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[1]Throughout this petition, RLC has set forth certain abbreviated references. Unless otherwise specified, these references shall have a uniform application as follows: (1) "F.F." means the Findings of Fact of the Trial Court dated July 25, 1977; (2) "C.T." means the Clerk's Transcript on Appeal; (3) "R.T." and "Val. R.T." mean the Reporter's Transcript of the Legal Issues Trial and the Reporter's Transcript of the Valuation Trial, respectively; and (4) "Exh." means the original exhibit introduced in evidence during the Legal Issues Trial.

January 19, 1977 before the Honorable Douglas R. Woodworth, sitting without a jury. After careful consideration of all the evidence presented, Judge Woodworth found that the County's actions resulted directly in a taking of a portion of RLC's property (hereafter "Parcel A") without due process of law in contravention of the United States and California Constitutions. Judge Woodworth further found that the County's activities resulted in damage to another portion of RLC's property (hereafter "Parcel B").

The second phase (valuation trial) commenced on June 26, 1978 before the Honorable James L. Focht and a jury of twelve persons. This trial terminated on August 7, 1978 with the jury awarding $6,071,395.55 to RLC in inverse condemnation damages. The judgment in inverse condemnation was entered on November 14, 1978 (C.T. 311).

1. The Property and Its Ownership.

RLC is a limited partnership[2] which owns approximately 1980 acres in San Diego County, California. RLC has no relationship with La Costa Country Club or the Club's property located to the east of El Camino Real (King's Highway), a major travel artery in California (R.T. 3). Of the total RLC ownership, 1630 acres are located north of La Costa Avenue, which runs perpendicular to the King's Highway, and 250 acres lie south thereof. The trial court found that the conduct of the County resulted in a taking of a portion of the real property in RLC's total ownership. This portion has been uniformly identified throughout these proceedings as Parcel A. This parcel of property consists of approximately 440 acres situated north of La Costa Avenue and

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[2]RLC is comprised of the following partners: (1) Donald B. Ayres, Sr., Howard F. Murphy and Rancho La Costa Associates, a corporation (General Partners); and (2) University of Southern California, Loyola-Marymount University, Barbara McCartney Murphy, Bernice Ayres Ludlam, Felix H. Farwell, Robert H. Beauchamp, Harry Brown, Howard S. Whiffen and Amy E. Whiffen, as Co-Trustees, Roger A. DeYoung, W. Herbert Allen, Donald B. Ayres, Mary Alice Ayres and Donald B. Ayres, Jr., as Trustees (Limited Partners).

west of the King's Highway. Of the total 440 acres, approximately 200 acres are situated directly in the Batiquitos Lagoon and the remaining 240 acres represent land situated north of the Lagoon.

The entirety of the RLC property was held by the limited partnership for investment purposes. Indeed, the primary purpose of the partnership was to hold the property until it was suitable for development. At all times, the general partners of RLC were aware that the Batiquitos Lagoon itself would be the primary component in any development plan (R.T. 6, 252-54).

The attractiveness and appeal of RLC's Batiquitos Lagoon property to County of San Diego officials for wildlife sanctuary and limited public recreational purposes endured for a number of years. For example, in January, 1976, the Park Development Division of the County's Parks and Recreation Department forwarded a memorandum to the County Department of Sanitation and Flood Control (Exh. 55). In this memorandum, the Park Development Director, James O. Tennant, set forth certain observations concerning the *unique public attributes* of the Batiquitos Lagoon area. It is not insignificant that Mr. Tennant made the following observations under the heading "Batiquitos Lagoon Regional Park":

> "*The park will appeal to the public due to availability of the Lagoon for limited recreational purposes, camping, picnicking, and other related activities*. It is located in the midst of a heavily populated area. The park will have *appeal for wildlife observation purposes* and will be particularly attractive to visitors throughout Southern California, since it will provide varied recreational activities. It is estimated that the park will have an *annual attendance of 1,050,000 people per year* once completed." (Exh. 55) (emphasis added).

In this same memorandum, Mr. Tennant provided the following ecological overview of the Batiquitos Lagoon Area:

> "Located on the coast north of Leucadia and south of Carlsbad, Batiquitos Lagoon is a proposed regional park site. *It is recognized as a possible important avian habitat area since the Lagoon is on the California coastal flyway*. This particular marsh is virtually in a non-productive state as a marine nursery.
>
> * * *
>
> "It is proposed that this Lagoon be deepened and allowed natural flushing by construction of a permanent opening to the ocean. Once deepened and opened to the ocean, the Lagoon would serve as a feeding area for certain aquatic birds since it would become a marine nursery for numerous fish and crustaceans. . . . Certain grasses and other vegetation could be planted to provide food for ducks and geese. *The entire habitat around the perimeter of the Lagoon would be improved by this project since increased avian life would also contribute to the perpetuation of terrestrial animals in the food chain, including fox, coyotes, bobcats, etc.*" (Exh. 55) (emphasis added).

2. RLC's Use of the Subject Property and Its Efforts to Devote It to a Reasonable, Beneficial and Economic Use.

At all pertinent times, the entirety of Parcel A, and most of the remainder of the total RLC ownership, was zoned A-1-8, an agricultural zone which allows no more than one (1) dwelling unit per eight (8) acres. RLC made reasonable efforts to utilize the total RLC ownership consistent with the A-1-8 zoning. Subsequent to 1969, this farming use became economically disastrous. For example, the total farming rent received by RLC for 1972 and 1973 reflects the economic impracticality of the continued farming use:

	1972	1973
RLC Total Ownership	$26,205	$27,200
Parcel A	$ 6,000	$ 6,000

(R.T. 99-102)

The real property taxes for 1972 and 1973 for the total RLC ownership (which includes Parcel A), and Parcel A itself, are reflected as follows:

	1972	1973
RLC Total Ownership	$186,646	$170,775
Parcel A	$ 43,956	$ 39,247

R.T. 99-102)

The farm rental income for 1972 and 1973 paid only 14.04% and 15.92%, respectively, of the real property taxes for the larger parcel and 13.65% and 15.28%, respectively, for Parcel A (Exh. 78; R.T. 99-100, 116-117).

As early as 1961, RLC became acutely aware that it was economically necessary to develop its Batiquitos Lagoon property and physically desirable to develop the same property as a recreational facility, surrounded by commercial and residential development. Early studies prepared by the engineering firm of Moffatt & Nichol, together with later master plan studies prepared by Rick Engineering, confirmed the practicality of this development concept. To facilitate this development concept, RLC and its engineers concluded that it would be necessary to secure an increased elevation of a bridge to be built over the Batiquitos Lagoon by the State Division of Highways as a segment of State Highway Route 2 (commonly known as Interstate Highway 5 or I-5) (R.T. 6).

Later in 1961, RLC and the County entered into an agreement whereby the County covenanted to contract with the State of California (Division of Highways) for the raising in elevation of the proposed bridge where the freeway (I-5) crossed over Batiquitos Lagoon to the west of the total RLC ownership. Although no portion of this bridge would cross or bisect RLC's property, RLC nevertheless agreed to pay

for the total cost of elevating this bridge in a sum not to exceed $95,000 and deposited this sum with the County. On November 9, 1961, the County entered into a contract with the State of California to raise the elevation of this bridge at a cost not to exceed $95,000 pursuant to the County's agreement with RLC. Thereafter, the freeway bridge over Batiquitos Lagoon was constructed at the raised elevation. In a letter from the County Counsel of San Diego County to RLC dated October 10, 1967, the County notified RLC that the cost of elevating the bridge was less than $95,000 and, accordingly, RLC received a refund of $24,557.72 (Exh. 62).

3. The Batiquitos Lagoon Regional Park.

On December 5, 1967, a general plan for the County of San Diego was adopted by the County Board of Supervisors. This general plan was entitled "San Diego County General Plan, 1990" (hereafter "Plan 1990"). This plan proposed a regional park at Batiquitos Lagoon upon privately owned property with undetermined boundaries (Exh. J). Plan 1990 specified a land use designation of .75 to 3.3 dwelling units per acre. This plan is still in effect.

Plan 1990 represented the first step in the County's march toward securing Batiquitos Lagoon for a regional public park. Subsequent to the adoption of Plan 1990, and continuing up through and including December 1972, RLC's property (Parcel A) fell within the grip of the County.

In 1969 or earlier, the County Board of Supervisors informally adopted a policy that its Planning Department would not accept any applications for rezoning or for special use permits with respect to the total RLC ownership. RLC was informed of this policy repeatedly in 1969 and again in 1971 (R.T. 26, 205). The last occasion was on March 16, 1971, when Donald B. Ayres, Jr., appearing before the County Board of Supervisors on behalf of RLC, requested allowance from the Board for the County Planning Department to accept an application from RLC to change the

zoning on the property south of La Costa Avenue (hereafter "Parcel C") from A-1-8 and commercial to R-1. This request was denied. (R.T. 33).

Prior to October 1970, RLC was informed by the County Planning Department that RLC should prepare a master plan for the total RLC ownership. RLC obtained the services of Rick Engineering of San Diego and presented a master plan to the County on October 9, 1970 (R.T. 30). Thereafter, the City Manager of Carlsbad forwarded a letter dated December 1, 1970 to the Planning Director of the County. A copy of this letter was forwarded to William A. Craven, a member of the County Board of Supervisors who represented the supervisorial district in which the total RLC ownership was located. This letter informed County officials that the Carlsbad City Manager contended among other things that the property involved was within the Carlsbad General Plan area and could only be developed under city standards after annexation to the city. Indeed, the City of Carlsbad was the only agency that could provide the necessary municipal services for development of the RLC ownership (Exhs. 2 and 16; R.T. 104-10, 339-49).

At a time prior to December 1, 1970, the County Board of Supervisors adopted a policy that the County of San Diego would not take any action affecting Parcels A or B that would be unsatisfactory to the City of Carlsbad, since these parcels fell within the City of Carlsbad's "sphere of influence" (R.T. 31). RLC was made aware of this policy. Indeed, Supervisor Craven recommended to RLC that it annex its property to the City of Carlsbad (R.T. 31).

In December 1970, the County caused a study known as the San Diego County Regional Parks Implementation Study to be prepared by independent consultants in furtherance of Plan 1990. On February 2, 1972, the County Board of Supervisors directed that copies of this completed study (hereafter "RPIS") be submitted to all interested jurisdictions in the County of San Diego for review and comment.

The RPIS set forth proposed boundaries for a park known as the Batiquitos Lagoon Regional Park and placed it in the highest priority group for acquisition and development. This group was known as the "Target '78 Parks" (Exhs. 7 and 18). The proposed boundaries of the Batiquitos Park included 441 ± acres of the total RLC ownership described in RLC's complaint as Parcel A.

The Public Works Administrator of the County, pursuant to memorandum dated April 4, 1972 (directed to the County Board of Supervisors), set forth the comments received from the various interested jurisdictions together with a reply comment of the County of San Diego staff relative to each such comment. These comments related to the recently circulated RPIS. The City of Carlsbad recommended that the Batiquitos Lagoon site lent itself to potential development as a private enterprise recreational complex with or without some public participation. In reply to this comment, the County staff emphasized that Batiquitos Lagoon should be in public ownership to prevent loss of this unusual and beautiful site (Exh. 4).

On April 19, 1972, the County Board of Supervisors accepted the RPIS and directed among other things that the Public Works Agency *acquire and develop* the Target '78 Parks as rapidly as available funding permitted. The Batiquitos Lagoon Regional Park, which included Parcel A of the total RLC ownership, was included within this directive (Exhs. 6 and 6A). The Batiquitos Lagoon Regional Park was rated second in priority among all parks in the system in physical attributes and the site was considered endangered by development and thus was placed in the highest target group (Exh. 18).

On May 24, 1972, RLC filed an application to annex the total RLC ownership to the City of Carlsbad. On July 3, 1972, the County Planning Department informed the Director of the Local Agency Formation Commission (hereafter "LAFCO") that Batiquitos Lagoon was shown on Plan

1990 as a regional park and recommended that none of the RLC property be annexed to the City of Carlsbad (Exh. 10).

On September 20, 1972, the County Public Works Administrator sent a memorandum to LAFCO stating that Batiquitos Lagoon Regional Park was included in the RPIS previously approved by the County Board of Supervisors in April 1972, and was slated for acquisition and development during the 1972-78 period. *This memorandum included a map specifically designating the boundaries of the Regional Park and outlined the boundaries of Parcel A and the total RLC ownership* (Exh. 12). The Public Works Administrator, in the same September 20, 1972 memorandum, further emphasized that the County Regional Park plan was projected as a system, rather than independent, unconnected sites. He therefore concluded that in light of the Carlsbad City Council's belief that the site should be developed as a private enterprise recreational complex, that the site be retained in the County for the County Regional Parks System (Ibid.).

The City Manager of Carlsbad informed LAFCO by letter dated September 29, 1972, that the bulk of the proposed annexation area was in the service area of Carlsbad and that even a regional park would require municipal services available only from Carlsbad (Exh. 16). This was reiterated by Mayor Dunne of Carlsbad at a public hearing held before LAFCO on October 2, 1972 relative to the annexation proposal. Supervisor Jack Walsh of the County Board of Supervisors, a member of LAFCO, spoke in favor of deleting the Batiquitos Lagoon Regional Park Area (Parcel A) from the annexation. Supervisor Walsh then moved that the area south of La Costa Avenue (Parcel C) be deleted from the annexation since it was outside the "sphere of influence" of Carlsbad. The motion of Supervisor Walsh passed (Exh. 72).

At a meeting of the County Board of Supervisors held prior to December 4, 1972, *it was stated by one of the*

Supervisors that the acquisition of Parcel A would be cheaper if the Park property were left out of the part annexed to Carlsbad. This information was received verbally and in writing by James O. Tennant, the Director of the County Park Development Division (R.T. 657-59).

On December 4, 1972, the annexation issue came before LAFCO for final discussion and vote. Supervisor Craven of the County Board of Supervisors, who was a member and the Chairman of LAFCO, stated that the County should continue control over all land use issues. Supervisor Craven further cautioned that the area within Batiquitos Lagoon Regional Park (Parcel A) should therefore not be annexed to the City of Carlsbad. The City Manager of Carlsbad informed LAFCO that any denial of annexation on the grounds that the County wished to develop a park was improper. Ignoring his advice, LAFCO approved RLC's annexation request with the notable exception of that area lying within the Batiquitos Lagoon Regional Park (441 ± acres which constitutes Parcel A). Supervisors Craven and Walsh cast their votes in favor of the deletion of Parcel A from the annexation (Exh. 73; R.T. 50-56).

Prior and subsequent to April 19, 1972, the highest and best use of Parcel A and those portions of the RLC total ownership north of La Costa Avenue (Parcel B in the complaint), if held in private ownership, was for the development of the Lagoon portion and the surrounding land as a private enterprise recreational complex together with related commercial and residential uses. Said uses were consistent with the expressed plans and desires of the City of Carlsbad and were in conformity with the development plans of the property immediately to the east of RLC's aforesaid property (Exh. E; Val. R.T. Vol. I at 315-17).

At the valuation trial, *the appraisers for both RLC and the County* testified as to the highest and best use for Parcel A as follows:

RLC per George Hamilton Jones, M.A.I.:

Lagoon Portion (His Parcel 1)

1. Recreational enhancement to adjacent uplands; and

2. Ultimate potential for higher and better use for marina purposes (Val. R.T. Vol. I at 322-24).

Land Portion (His Parcels 2 & 3)

1. Recreation type commercial resort; and

2. Condominiums, townhouses, patio homes, single family homes (Val. R.T. Vol. I at 322, Vol. II at 53).

County per Norman Robertson, M.A.I.:

Lagoon Portion

Open space and water oriented development (Val. R.T. Vol. II at 200).

Land Portion

1. Single family, multiple family, cluster dwelling units (5056 residential units) (Val. R.T. Vol. II at 200); and

2. Some sports and neighborhood commercial (90 acres of commercial) (Val. R.T. Vol. III at 101).

Both appraisers concluded that Parcel A would have to be annexed to the City of Carlsbad to provide the necessary services for development and that the required zoning could be obtained from the City of Carlsbad (Val. R.T. Vol. I at 315-319; Val. R.T. Vol. II at 199).

RLC attempted to sell the larger parcel, or portions thereof, from and after 1969. A sale of the RLC total ownership for $12,000,000 fell through after the buyer had already reported to RLC that he had arranged the financing for the purchase. As a direct result of the County's activities in connection with the Batiquitos Lagoon Regional Park, the buyer concluded that the property was unacceptable. Accordingly, the sale was not consummated (Exhs. 74 and 75; R.T. 58-61).

Subsequent interested purchasers in the total RLC ownership lost interest when informed of the County's activities relative to the Batiquitos Lagoon Regional Park. Those in-

terested in a possible purchase of a portion of the larger parcel suspended all interest when informed of the County's activities (R.T. 61-63).

4. The Batiquitos Lagoon Regional Park and the State-Owned Property.

In 1972, the State of California owned a 7.33 acre parcel of land utilized by the State as a rest stop area. This property fell within the boundaries of the proposed Batiquitos Lagoon Regional Park as detailed in the RPIS. On April 20, 1972, the day following the acceptance of the RPIS by the County Board of Supervisors, the Park Development Division of the County Public Works Agency directed a memorandum to the Real Property Division. In this memorandum the Director of the Park Development Division stated:

> "We understand that the State Highway Division has been in contact with you regarding a possible trade for this property for some County property in the Santee area. *As the property at Batiquitos will definitely be required for the Regional Park it is requested that you make every effort to consummate such a trade*" (Exh. 7) (emphasis added).

No such trade or sale was consummated by the County. The State Department of Transportation informed the County that the value of this property was $225,000. The Public Works Administrator, by memorandum dated October 29, 1973, recommended a discontinuance to the County Board of Supervisors of negotiations for the purchase of this State owned property. The Public Works Administrator stated:

> "Your staff believes the $201,000 budgeted for acquisition and development of this parcel can be more advantageously applied to another high priority regional park and that *adequate safeguards are available to prevent the use of the property which would not be*

compatible with possible future adjacent park uses'' (Exh. 19) (emphasis added).

Approximately one year prior to the date of Exhibit 19, the Public Works Administrator recommended to the County Board of Supervisors that it:

''*Express itself by resolution that the San Diego County Board of Supervisors does not anticipate approval of any future rezoning action that would be incompatible with the proposed Batiquitos Lagoon Regional Park*'' (Exh. 21) (emphasis added).

The County Board of Supervisors paid attention to the Public Works Administrator and formally adopted the following Resolution on November 14, 1972:

''That this Board intends to maintain zoning in the area of the subject property to be consistent with the General Plan and *does not anticipate approval of any future rezoning action that would be incompatible with the proposed Batiquitos Lagoon Regional Park*'' (Exh. 23) (emphasis added).

5. The Trial Court's Findings.

On July 25, 1977, the Honorable Douglas R. Woodworth, after due consideration of the evidence presented at the legal issues trial, made the following Findings of Fact:

''The opposition of the Defendant, acting through its Board of Supervisors and Department Heads, was a material and procuring cause for LAFCO's deletion of Parcels A and C from the proposed annexation on October 2, 1972 and December 4, 1972'' (F.F. 24; C.T. 174);

''At all material times in 1972 the Board of Supervisors for Defendant, pursued its policy of blocking any economic, beneficial use of Parcel A in order to ensure that it could be acquired by Defendant as cheaply as possible'' (F.F. 25; C.T. 174-75);

"It was not possible to develop the total RLC Ownership or Parcel A to any use other than farming so long as Defendant maintained A-1-8 zoning on the property and precluded its annexation to the City of Carlsbad" (F.F. 28; C.T. 175);

"Urban services including but not limited to sewer service necessary for development could only be obtained for Parcel A and Parcel B by the annexation of said land to the City of Carlsbad" (F.F. 29; C.T. 175);

"At all material times there would have been a reasonable, beneficial and economic use of Parcel A but for the activities of Defendant in the taking of Parcel A" (F.F. 30; C.T. 175);

"Plaintiff has been deprived by Defendant of any reasonable, beneficial use of Parcel A and said Parcel became valueless from and after April 19, 1972" (F.F. 31; C.T. 175-76); and

"By reason of the continuing course of conduct by defendant culminating in the order of April 19, 1972 for acquisition of Parcel A, among other properties, the passage of Resolution 17 on November 14, 1972 and the denial of annexation of Parcel A on December 4, 1972, plaintiff has been deprived of all practical, beneficial or economic use of Parcel A" (F.F. 33; C.T. 176).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With Decisions of This Court as to When Governmental Conduct Results in a Taking of Private Property.

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation."

Here, RLC alleged and proved at trial that the County formed a firm intent to acquire RLC's Batiquitos Lagoon Property, directed the County Public Works Agency to acquire this property as rapidly as funding permitted and thereafter embarked on a course of conduct designed to totally frustrate RLC in using its property in any reasonable, economic fashion. The evidence presented below paints a picture of inequitable activity by the County over a six-year period of time (1967-1973) undertaken as a prelude to the County's acquisition of RLC's property. The evidence demonstrated the following: (1) A firm intent formed by the County to acquire RLC's Batiquitos Lagoon Property — the RPIS accepted by the County directed the County Public Works Agency to acquire and develop the Target '78 Parks as rapidly as available funding permitted (Exhs. 6 and 6A); (2) Commencing in 1969 the County adopted a policy which prohibited RLC from even filing an application to rezone its property from the existing A-1-8 zone; (R.T. 33); (3) In 1972 the County Board of Supervisors, at the beckoning of its Public Works Administrator, adopted a formal resolution that approvals of future rezoning that are incompatible with the Batiquitos Lagoon Regional Park were not anticipated (Exh. 23); (4) The County's representatives consistently made known that the Batiquitos Lagoon Property would definitely be required for the Batiquitos Lagoon Regional Park and that adequate safeguards existed to prevent any use of this property in a manner inconsistent with the future park use (Exhs. 7 and 17); (5) The County, through its representatives, made clear to LAFCO that the Batiquitos

Lagoon property owned by RLC was slated for acquisition during the 1972-78 period; (Exh. 12), and the County Planning Department recommended to LAFCO that none of the RLC property be annexed to the City of Carlsbad (Exh. 10); (6) Two members of the County Board of Supervisors (Walsh and Craven) actively opposed the annexation of Parcel A to the City of Carlsbad (Exh. 73; R.P.T. 50-56); (7) A member of the County Board of Supervisors stated, at a Board Meeting held prior to December 4, 1972, that the *acquisition of Parcel A would be cheaper if the Park Property were left out of the part annexed to the City of Carlsbad* (R.T. 657-59); (8) LAFCO staff comments concerning the annexation of the RLC Lagoon Property to the City of Carlsbad were negative in light of the ". . . importance of establishing a regional park for the Batiquitos Lagoon . . ." (Exh. 15); and (9) On December 4, 1972, the bulk of RLC's property was approved for annexation to the City of Carlsbad but LAFCO denied the annexation of RLC's Batiquitos Lagoon Property (Parcel A) to the City of Carlsbad.

This Court has long recognized that when the *use* and *value* of private property is taken away by governmental actions, then the result is equal to an appropriation of the title to the property. As this Court aptly observed in *United States v. Dickinson*, 331 U.S. 745, 748 (1947):

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it . . . ."

In the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court added an important dimension to the Fifth Amendment. There this Court had before it for consideration a question involving the propriety of a Pennsylvania State Statute (Kohler Act) which forbid the mining of coal located beneath private dwellings and cities where the right to mine was reserved by express grant to a mining company. This Court reversed the ruling of the Supreme Court of Pennsylvania that the Kohler Act con-

stituted a legitimate exercise of the State's police power (260 U.S. 393 at 412, 416). In reaching this result, this Court made certain observations which today constitute polestars in Fifth Amendment jurisprudence. This Court noted:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment [citation omitted]. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> "*The general rule at least, is that while private property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*" (*Id.* at 415) (emphasis added).

A guiding Fifth Amendment principle was thus announced more than two generations ago: When governmental regulation stretches out to actually impair protected property rights, then a taking has occurred and compensation is constitutionally compelled. The teaching offered by this Court in *Pennsylvania Coal Co. v. Mahon* has endured for more than five decades. This case is now firmly enshrined in the pantheon of judicial decisions.

RLC has never argued or advanced the proposition that the adoption of Plan 1990 by the County resulted in a taking of RLC's Batiquitos Lagoon property. RLC does not advance this argument now. What RLC did contend in the proceedings below, and continues to contend before this Court, is that the cumulative confiscatory conduct of the County detailed in depth in the Statement of the Case to this Petition, resulted in a taking of RLC's property within the

meaning of the Fifth and Fourteenth Amendments to the United States Constitution.

The end result of the County's protracted conduct was to isolate RLC's Batiquitos Lagoon property from any reasonable, economic use. Although there is not one isolated occurrence, regulation or ordinance which can be focused upon, the County's overall activity formed a web from which RLC could not escape.

Only recently, this Court had an opportunity to express itself on the nature of governmental regulation which impacts directly on the use and enjoyment of private property. In *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978), this Court observed:

> "While this Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole,' [citation omitted], this Court quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [citation omitted]. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' " (438 U.S. 104 at 123-24).

While this Court recently conceded in the *Penn Central* case that it has been unable to enunciate or formulate a "set formula" for allocating private losses between the affected property owner and the public, this Court has made clear that the " 'Constitution is intended to preserve practical and substantial rights, not to maintain theories' " (*United States v. Dickinson*, 331 U.S. 745, 748 (1947)).

In assessing whether governmental regulation or conduct has crossed the Maginot Line separating compensible from non-compensible conduct, this Court has recently provided the following judicial signposts:

> "Although the ordinances limit development, *they neither prevent the best use of appellant's land* [citation omitted], nor extinguish a fundamental attribute of ownership [citation omitted] . . . . [*T*]*he appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials*. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." (*Agins v. City of Tiburon*, ... U.S. .... (100 S.Ct. 2138, 2142 (1980)) (emphasis added).

In the situation here presented, the trial court found, after consideration of all the evidence presented, that the combined conduct and activity of the County resulted in a taking of RLC's Batiquitos Lagoon property. The trial court specifically found that RLC had been deprived by the County of all reasonable, beneficial and economic use of Parcel A (F.F. 30; C.T. 175) and further found that it was impossible for RLC to devote Parcel A to any use other than a farming use so long as the County maintained the A-1-8 zoning on the property and precluded the property's annexation to the City of Carlsbad (F.F. 28; C.T. 175).

The Court of Appeal found, in the face of the overwhelming and uncontroverted evidence presented by RLC, that RLC could still devote its property to certain, unspecified uses. Accordingly, the Court of Appeal concluded that RLC's property was not taken in the constitutional sense. This ruling ignores both the evidence presented and the previous unassailable rulings of this Court. It is uncontested that RLC can never devote its Batiquitos Lagoon property to any use other than a farming use absent annexation to

the City of Carlsbad. The fact that RLC can still devote its property to a farming use cannot be equated with the quality of use present in *Agins v. City of Tiburon, supra.*

There the property owners initially acquired 5 acres of unimproved land for residential development. Thereafter, the City of Tiburon modified existing zoning ordinances by restricting permissible residential density on the subject property. Under the modified ordinances the property owners were permitted to residentially develop the property with a density of between one and five single-family residences on the 5 acre tract. Although the modified zoning ordinances reduced the number of residences that could be built, the ordinances did not restrict the property owners from devoting the property to its "best" use (residential development).

Here, the best use of RLC's property was for the development of the Lagoon portion and the surrounding land as a private enterprise recreational complex together with related commercial and residential uses. The conduct of the County totally thwarted and frustrated RLC's expectations with respect to the development of its property for such use. Indeed, as a direct result of the conduct of the County, not even the most ravenous scavenger would approach the desiccated remains of RLC's once valuable Batiquitos Lagoon property.

In aid of its ultimate ruling, the Court of Appeal concluded that Plan 1990, rather than restrict the uses to which RLC's property could be put, "only serve[d] R.L.C.'s advantage [by] allowing medium low residential density (.75 to 3.3 dwelling units per acre) as opposed to an agricultural use (1 dwelling unit per 8 acres)" (111 Cal.App.3d 54 at 60; App. at 5).

On the surface, the observation of the Court of Appeal that Plan 1990 worked to the advantage of RLC is appealing. Indeed, the Court of Appeal observed that RLC can "compel the County to conform the zoning to the General Plan" (111

Cal.App.3d 54 at 65, n. 2; App. at 11). While RLC can most certainly pursue this remedy, such a change of zone would leave RLC exactly in the position it finds itself now with respect to the A-1-8 zone. Simply stated, RLC could not, and cannot, reasonably, beneficially and economically utilize its property absent annexation to the City of Carlsbad. With respect to Parcel A, municipal services (sewer, fire, police, etc.) can be provided only by the City of Carlsbad (Exh. 16). The County most assuredly recognized the importance to RLC of annexation. Indeed, Supervisor Craven recommended to RLC that it pursue annexation of its property to the City of Carlsbad (R.T. 31). When it came time for the vote on RLC's annexation proposal, Supervisor Craven, a member and Chairman of LAFCO, voted against the annexation. Incredibly, Supervisor Craven actively opposed the annexation of the Batiquitos Lagoon property after recommending to RLC that it seek annexation.

Although no one single event or regulatory enactment of the County can be said to have resulted in a "take" of RLC's Batiquitos Lagoon property, the events, activities and conduct of the County, when viewed in combination and not in isolation, most assuredly placed a stranglehold on RLC in utilizing its property in any meaningful fashion.

This Court has repeatedly emphasized that when governmental activity results in the destruction of the economic utility of private property, then a taking has occurred in the constitutional sense. The question of what constitutes a viable and economic use of private property is an important one. RLC does not dispute that it can still devote its property to an agricultural use. Indeed, there should be little dispute that all property can be put to *some* use. However, the bald assumption made by the Court of Appeal that there are still "viable" uses to which RLC can devote its property goes far beyond the evidence presented and, indeed, economic reality. This Court has displayed a continuing sensitivity to this economic utility concept. For example, in *United States*

v. Causby, 328 U.S. 256 (1945), this Court found that federal planes operating in a low flight pattern over the owner's property resulted in a take of the affected property. This court observed:

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, *a residential section to a wheat field.* Some value would remain. But the use of the air space immediately above the land would limit the utility of the land and cause a diminution in its value." (328 U.S. 256 at 262) (emphasis added).

The instant case presents a classic, albeit unusual and unfortunate, picture of governmental activity and conduct, carried out over a long period of time, which results in the total frustration to the property owner of its legitimate investment expectations for its property.

RLC is mindful that the governmental entities such as the County have been given by California law the responsibility to formalize and adopt land-use plans and regulations (Cal. Govt. Code § 65700, et seq.). These land-use plans and regulations benefit the public as a whole, and slight losses arising therefrom must be borne by the property owner. However, there comes a point when governmental activity and conduct is so harsh in its impact as to command constitutional protection.

Viewing the evidence in combination and not in isolation, it is beyond dispute that the County formed a firm intent to acquire RLC's Batiquitos Lagoon Property and then engaged in activity designed to preclude RLC from using its property in any reasonable economic manner. At every turn the County, through its representatives and officials, placed "obstacles in the path" of RLC in the use of its property (*Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 120 (1973)). The County's obstructionist conduct went far beyond the protected initial planning activity sanctioned by the California Supreme Court in *Selby* and further ad-

dressed in *Briggs v. State of California*, 98 Cal.App.3d 190 (1979).

Here, the County was unyielding in its efforts to preclude RLC from effectively and reasonably using its property. The County's conduct cannot be sanctioned as legitimate planning activity or otherwise. To do so makes a mockery of the due process protections afforded by the Fifth and the Fourteenth Amendments.

Justice and fairness command that the County assume responsibility for its conduct. Anything less is constitutionally impermissible.

2. The Decision Below Raises a Vital Question for California Property Owners Concerning the Continued Vitality of the Inverse Condemnation Remedy.

The inverse condemnation remedy has been long recognized by the California judiciary. For example, in *Eldridge v. City of Palo Alto*, 57 Cal.App.3d 613 (1976), the California Court of Appeal adopted the following illuminating observations made by the Court in *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965):

> "*An unrecognized taking in the guise of regulation is worse than confiscation. . . . 'An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property*. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner *subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden*.' " (57 Cal.App.3d 613 at 627) (emphasis added).

Similarly, in *Peacock v. County of Sacramento*, 271 Cal.App.2d 845 (1969), the California Court of Appeal upheld the ruling of the trial court that a taking occurred

by reason of the cumulative conduct and actions of the County of Sacramento. The Court of Appeal made the following cogent observations:

> "The County contends—independently of the effect of Ordinance 697 and the rezoning of the area—that enactment of the general plan of November, 1963 furnished no basis for a finding that plaintiffs' property was taken in inverse condemnation. *The court, however, made no such singular finding. The evidence of its cumulative effect with the other County enactments, considered in relation to acts of the county's officers administering the various restrictive provisions, contributed to the court's determination of a taking.* The Court found the actions of the county to be reasonable up to a point in time determined to be November 13, 1963; the actions of the county in continuing the restrictions beyond that date were found to be unreasonable and oppressive, constituting a compensible taking of plaintiffs' land. *The finding has substantial support in the record as a whole.*" (271 Cal.App.2d 845 at 861). (emphasis added).

For years, the California judiciary followed the lead of this Court in preserving and protecting the private property rights of land owners in the State of California. In 1979, the California Supreme Court, in the much addressed case of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979), veered away from this traditional and time honored rule. In *Agins*, the California Supreme Court, in dictum, made the following startling comment:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . . ." (24 Cal.3d 266 at 274, 276-77).

The potential impact of this dictum is obvious. Indeed, the very court that issued the decision in the case presently before this Court has already ruled, in an unpublished opinion, that "the individual who is deprived of his property due to the state's exercise of the police power is not entitled to compensation. . . ." This remarkable statement appears in the unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One, in the case of *San Diego Gas & Electric Company v. City of San Diego*, a case presently pending before this Court (No. 79-678).

If this Court concludes that the decision of the California Court of Appeal in the *San Diego Gas & Electric* case is the proper one, then RLC's present petition would, of necessity, be subject to denial. If the reverse is true, the question presented herein is sufficiently important to warrant this Court in granting RLC's petition.

The evidence presented below demonstrates unquestionably that the conduct of the County effectively destroyed all economic utility of RLC's Batiquitos Lagoon property. The issue raised by the within petition provides this Court with an opportunity to reaffirm that compensation is required under the Fifth and Fourteenth Amendments when governmental activity virtually destroys the economic usefulness of private property. Indeed, the within case presents a unique opportunity for this Court to further define and clarify the economic utility concept addressed in *Agins v. City of Tiburon*, ... U.S. .... (100 S.Ct. 2138, 2142 (1980)).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeal.

Court of Appeal, Fourth Appellate District, Division One, State of California.

Rancho La Costa, Plaintiff and Respondent, v. County of San Diego, Defendant and Appellant. 4 Civ. No. 18651, (Super. Ct. No. 348543).

Filed: Oct. 9, 1980.

Donald L. Clark, County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel and Cameron Reeves, Deputy County Counsel, for Defendant and Appellant.

State of California acting by and through the California Coastal Commission and William M. Boyd, Linda Breeden, T. Roy Gorman, John Bremner, Janet G. Tulk and Nancy Wainwright, as Amici Curiae on behalf of Defendant and Appellant.

Musick, Peeler & Garrett and Donald J. Drew and Kenneth A. Holland, for Plaintiff and Respondent.

COLOGNE, Acting P.J. — The County of San Diego (County) appeals the judgment awarding Rancho La Costa (R.L.C.) damages for inverse condemnation in allegedly taking land for public park purposes. The trial had been bifurcated and the judge sitting without a jury made a finding the County had taken R.L.C.'s property without due process of law under the California and United States Constitutions, and further found the affirmative defenses were without merit. In the second phase of the trial, a jury awarded damages exceeding $6 million.

R.L.C. is a limited partnership owning approximately 1,980 acres. The property subject of this action consists of approximately 440 acres north of La Costa Avenue and west of El Camino Real, described in this action as "parcel A,"

200 acres of which are in and around the Batiquitos Lagoon, and 240 acres of which are situated north of that lagoon.

All of parcel A and most of the rest of the property involved in this action was zoned A-1-8, indicating it is an agricultural zone which allows no more than one dwelling unit for each eight acres.

In 1961, R.L.C. retained the engineers' firm of Moffatt and Nichol who prepared a feasibility study for the development of Batiquitos Lagoon. Their studies, together with a later master plan prepared by Rick Engineering, concluded it was physically and economically feasible to develop the lagoon as a recreational facility surrounded by commercial and residential development. To accomodate that plan, however, it would be necessary to secure an increased elevation of the bridge which the state Division of Highways was building over the lagoon.

As a result of these studies and the willingness of the state and the County to participate, R.L.C. ultimately paid the County $70,442.25, and it in turn contracted with the state to raise the bridge to the appropriate elevation.

The General Plan of the San Dieguito area adopted on September 5, 1967, included the subject property but did not show a regional park in that area. The San Diego General Plan, 1990 (General Plan 1990) adopted three months later, however, did propose a regional park at Batiquitos Lagoon on the privately owned property. Under this plan, the land use designation applicable to the subject property was medium low residential density allowing .75 to 3.3 dwelling units per acre. Though this plan remains in effect, zoning has not been changed to conform.

In 1969 or earlier, the board informally adopted a policy that the planning department would not accept applications for rezoning or for special use permits with respect to the

subject property, and R.L.C. was advised of that policy. R.L.C. made no application for any changes, having concluded it would be an idle act.

In December 1970, the County caused to have prepared a Regional Park Implementation Study (RPIS) in order to establish an implementation plan for General Plan 1990. The RPIS final report included the subject area as a proposed regional park having a high priority for completion. The report was accepted by the board on April 19, 1972, and requested (1) the planning commission to initiate hearings to include this in the General Plan 1990, (2) the chief administrative officer to propose a financial program to acquire and develop all the parks and (3) the public works agency to initiate a precise plan of acquisition and development of the parks.

After April 19, 1972, the County entered into negotiations to acquire a 7.33-acre parcel of state-owned property adjacent to Interstate 5 west of this general area, the land having been declared surplus by the state. It was within the boundaries of the proposed Batiquitos Lagoon Regional Park.

On May 24, 1972, R.L.C. filed an application to annex all the R.L.C. property to the City of Carlsbad, the city having earlier stated it would not consider serving the area with city services, including sewer services, absent annexation. The County planning department advised the Local Agency Formation Commission (LAFCO) that Batiquitos Lagoon was shown on the County General Plan 1990 as a regional park and recommended that none of the property be annexed to the city. The two supervisors who served on LAFCO also played an active role in opposing the annexation. On November 14, 1972, pursuant to a recommendation of the County public works administrator in connection with the proposed purchase of the 7.33-acre surplus

state property, the board adopted a resolution indicating it did not anticipate approval of any further rezoning that would be incompatible with the proposed regional park. The opposition to annexation by the County was found by the trial court to be "a material and procuring cause" for LAFCO's deletion of two parcels including the subject property from the proposed annexation. LAFCO staff recommended the annexation be denied and further that the regional park area be deleted from any future city annexation or incorporation proposal. By a six-to-zero vote, denial of annexation of parcel A occurred on October 2 and December 5, 1972. LAFCO approved annexation of the more northerly parcel B owned by R.L.C.

The trial court found the board of supervisors at all material times "pursued its policy of blocking any economic, beneficial use of Parcel A in order to ensure it could be acquired by [the County] as cheaply as possible."

From an economic point of view, it is apparent R.L.C. had to contract with the City of Carlsbad to obtain city services if it wanted to put together any sort of subdivision of this property. Carlsbad was the only entity capable of supplying these urban services. R.L.C. asserted, and the trial court found as a result of County's action, it was deprived of all reasonable, beneficial use of parcel A and the severance of that beneficial use affected the value of parcel B. A claim against the County for this taking was filed and rejected. This action ensued.

At issue is whether the County by its actions effected a "taking" as contemplated by such inverse condemnation cases as *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 [104 Cal. Rptr. 1, 500 P.2d 1345], and *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845 [77 Cal. Rptr. 391]. In holding it did not, we find it unnecessary to address all the issues raised by this appeal.

In order to state a cause of action in inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119-120 [109 Cal. Rptr. 799, 514 P.2d 111]).

Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police powers some hardships must be borne by individuals as the price of living in a modern, enlightened and progressive community. Further, landowners have no vested right in existing or anticipated zoning ordinances. (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516 [125 Cal. Rptr. 365, 542 P.2d 237]; *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600, 602 [55 Cal. Rptr. 710].) If it can be said the adoption of General Plan 1990 changed the zone of R.L.C.'s property, it did not constitute a taking of a vested right. In any event, such a change would only serve R.L.C.'s advantage allowing medium low residential density. (.75 to 3.3 dwelling units per acre) as opposed to an agricultural use (1 dwelling unit per 8 acres). This could only increase the value. There could be no damage.

The adoption of a general plan is a legislative act and is by its nature tentative and subject to change. The enactment of a general plan for future development of an area indicating potential public use of privately owned land does not amount to inverse condemnation (*Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 119). The Legislature has authorized such long range plans, including specific

plans (Gov. Code, § 65450 et seq.)[1] and district plans (§ 66105 et seq.) for orderly community growth. So long as the County has not placed obstacles in the path of the property owners in the use of their land or has not refused permission to build or subdivide the property, there is no taking merely in the act of adopting the plan (*Selby, supra,* at p. 120). Thus the acceptance of the general plan or the RPIS or the request to staff for physical and financial feasibility studies is no more than planning and does not affect the landowners' interest. The planning and construction of regional parks of this size require a substantial amount of work, and to hold the announcement of the plan or the initiation of the feasibility studies results in inverse condemnation of properties designated for ultimate acquisition would result in forced purchase of property before it was determined to be economically feasible; it would severely hamper government's ability to provide any such programs (*Smith v. State of California* (1975) 50 Cal.App.3d 529, 536-537 [123 Cal. Rptr. 745]).

In *Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com* (1975) 46 Cal.App.3d 1, 3 [120 Cal. Rptr. 108], the court held the adoption of a resolution "fixing and establishing within the shoreline band the boundaries of water-oriented priority land uses" according to a general plan pertaining to the whole of San Francisco Bay and its shoreline adopted pursuant to state law (§§ 66600, 66602), does not constitute a taking for which the property owner is entitled to damages.

The California Supreme Court, as late as March 1979, in *Agins v. City of Tiburon,* 24 Cal.3d 266, at pages 275 to 276 [157 Cal. Rptr. 372, 598 P.2d 25], said:

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[1]Unless otherwise indicated, all section references are to the Government Code.

> "[T]he . . . abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, 'If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.' [Citing *Selby, supra,* 10 Cal.3d 110, at p. 120.]
>
> ". . . . 'This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe.' (*Hall, Eldrige v. City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L.J. 1569, 1597.)" (*Agins v. City of Tiburon, supra,* at pp. 275-276.)

Agins involved a low density, open space zoning modification in connection with the city's preparation of a general plan. As a result, the property owners could build a maximum of five one-family dwellings on their five acres of prime hilltop, bayview land. The court in *Agins* held no inverse condemnation remedy attended the ordinance changes.

While it is true an action for inverse condemnation has to be permitted where a public entity has engaged in inequitable precomdemnation activity, the cases which have sustained such liability have been ones where the public entity publicly expresses the intention to pursue acquisition of the property. (See *Klopping v. City of Whittier, supra,* 8 Cal.3d 39, where the city commenced eminent domain proceedings and then abandoned the announced plan never-

theless stating it intended to acquire the precise parcel.) Similarly in *Peacock v. County of Sacramento, supra,* 271 Cal.App.2d 845, the county refused the owner permission to develop land near an airport which the county had announced its intention to develop, assuring the owner it was of no consequence since it intended to purchase the land.

The freedom with which local government may exercise its functions particularly in the area of zoning, was recently affirmed by the United States Supreme Court in *Agins v. City of Tiburon* (1980) ___ U.S. ___ [___ L.Ed.2d ___, 100 S.Ct. 2138], which upheld the judgment of the California Supreme Court in the same case, *supra*. Our highest court said, in part (___ U.S. ___, ___-___ [___ L.Ed. 2d ___, ___-___, 100 S.Ct. 2138, 2142-2143]):

> ". . . . The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. [Fn. omitted.] Such governmental purposes long have been recognized as legitimate. . . .
>
> ". . .
>
> ". . . Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in market value that the appellants might suffer.
>
> "Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States v. Causby*, 328 U.S. 256, 262, and n. 7, 66 S.Ct. 1062, 1066, . . . nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna v. United States*, 444 U.S., at ___, 100 S.Ct., at 393. . . . [T]he appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact

> of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co. v. New York City*, 438 U.S., at 124, 98 S.Ct., at 2659."

And in a footnote, the court declared:

> "Appellants also claim that the city's precondemnation activities constitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. [Citation.] Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent the extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' [Citations.]"

Finally, we must consider whether the County's role in opposing annexation of R.L.C. property to the City of Carlsbad constituted a taking. Having concluded this property should be included in the general plan as a regional park, the County had an interest in seeing that the plan was followed in an orderly manner. We know of no authority which gives a property owner a vested right to have his property included within the boundaries of any particular city, district or authority. The prospect one's property might become more valuable if it is annexed to the city where certain special services are available at a more reasonable cost is a pleasant contemplation for a landowner, but it is certainly not a vested right. The County could not and did not restrict

development within the limitations of applicable zoning law and the general plan. There was a finding by the trial court the County adopted an informal policy that the planning department should not accept applications for "rezoning" or for "special use permits." That policy amounted only to a confirmation that existing zoning would be followed without exception. It sought only to continue its jurisdiction over the area so that the development could continue to conform to General Plan 1990. The County had spent considerable amounts of time and money on these studies and planning and it clearly had a real interest in the development of a regional park. The city's interest in such a park was certainly not as pronounced and the city was not in a position to finance such a regional park. Preservation of a general plan and active efforts to continue a contemplated program of public accommodation is a legitimate county function (see *Agins v. City of Tiburon, supra,* ___ U.S. ___ [___ L.Ed.2d ___, ___, 100 S.Ct. 2138, 2142]).

The Local Agency Formation Commission is a separate governmental entity and operates independently of the county or cities which it serves (see generally, § 54773 et seq.). Its purpose, inter alia, is to review and approve or disapprove proposed annexation of territory to cities (§ 54790). In reaching its decision, LAFCO is required to hold public hearings (§ 54793) and consider a number of factors relative to the annexation (§ 54796). Included is the effect of the proposed action as well as alternatives on the cost and adequacy of services and controls in the area and adjacent areas, on mutual social and economic interests, and on the local government structure of the County (§ 54796). The social need for a regional park and the County's superior financing ability are clearly factors to be considered, and it is entirely appropriate for the County to bring this to the attention of LAFCO. To bar it from pre-

senting such information or actively advocating a position opposed to annexation for that reason would inhibit the performance of its solemn duty to serve the best interests of the public.

The makeup of LAFCO, having only two board of supervisors members on the seven-member commission (§ 54780), provides an adequate safeguard for the exercise of independent judgment by LAFCO free of domination by the County. We see nothing improper in the County's action, both through its department heads as well as its elected representatives, bringing to the attention of LAFCO the County's general plan to include this area in a regional park and explaining the amount of work and effort put into the plan so the social and economic interests could be weighed by LAFCO. We cannot view that as inverse condemnation any more than any other planning activity; nor does it constitute a conflict of interest. The County is not responsible for the independent decision of LAFCO here (see *Meyers v. Local Agency Formation Com.* (1973) 34 Cal.App.3d 955, 962 [110 Cal. Rptr. 422]).

The County's activities substantially advance legitimate public goals and do not prohibit development of the R.L.C. property as contemplated by the landowner. Nothing in the County's policy prevents R.L.C. from developing its property in conformance with existing zoning laws,[2] though it must be admitted it would be much more expensive without the services offered by the city. We recognize there is an added burden of supplying such things as water and sewage disposal services which would be required before the property could be developed and this is especially so now since

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[2]The General Plan 1990 adopted by County authorized a greater density of land use than the existing zoning. R.L.C. has a right under law to compel the County to conform the zoning to the General Plan (§ 65860).

the entry into the picture of the California Coastal Commission. The fact the development is more expensive does not mean there has been a denial of any of the use by the landowner. We know of no authority which would make the burden of increased cost to the property owner alone a basis for holding rezoning or general plan changes effect an inverse condemnation. Similarly, the County's duty to provide its input in annexation hearings should not be denied or burdened with the threat of a claim for inverse condemnation simply because the values to the property owner are greater one way as opposed to the other.

We do not suggest R.L.C., or any other property owner, is without remedy under the conditions presented. As the Supreme Court pointed out in *Agins v. City of Tiburon, supra,* 25 Cal.3d 266, at pages 276 to 277:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances."

Whether a zoning regulation, general plan or annexation effort by the County is excessive in a particular situation involves questions of degree, turning on the individual facts of each case, but such a local government activity may be held unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property (*Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 277). Neither the zoning ordinance, general plan, annexation procedures, or the informal policies of the County produced that results. Aware of the uses R.L.C. could still make of its property, we can say there was not a taking which amounted to inverse condemnation.

Judgment reversed with directions to dismiss the action. Staniforth, J., and Wiener, concurred.

No. 80-1505

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RANCHO LA COSTA,

Petitioner,

vs.

COUNTY OF SAN DIEGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, is reported at 111 Cal.App.3d 54. It is set out in full in the appendix to the petition herein.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1257(3). The jurisdictional facts are correctly stated by petitioner in its jurisdictional statement.

QUESTION PRESENTED

Does long-range planning for future public regional parks by local government constitute a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

The petition herein seeks review of the opinion of the California Court of Appeal, Fourth Appellate District, Division One, ordering a judgment of dismissal of petitioner's action in inverse condemnation thereby reversing a Superior Court judgment which found liability against the County of San Diego (hereinafter "County"). The Court of Appeal held that there was not a taking which amounted to inverse condemnation. The statement of the case in the petition is only partially correct, since many assertions of fact therein are not supported by any evidence and were rejected by the Court of Appeal below.

Respondent will summarize the official actions taken by the County with respect to petitioner's property, the type of actions which the County did not take, and finally will clarify the important facts which have been misstated by petitioner.

1. OFFICIAL ACTIONS OF THE COUNTY

The evidence shows that the only official actions taken by the County, acting through its Board of Supervisors, with related to Rancho La Costa's (hereinafter "R.L.C.") property, were the following:

(a) The adoption of the County's General Plan 1990, in 1967, which designated potential regional park sites throughout the County and designated one such site with undetermined boundaries in and around Batiquitos Lagoon with a statement that a potential park at Batiquitos Lagoon should be developed

in cooperation with both private owners and public agencies. (Exh. 1.)[1]

(b) The acceptance by the Board of Supervisors, on April 19, 1972, of a Regional Park Implementation Study (RPIS) which was an initial study by private consultants concerning potential regional parks designated in the General Plan 1990, and represented preliminary planning only as more precise planning, fixing specific boundaries and determination of funding sources had to be accomplished prior to any future acquisition and development of properties for the potential regional parks. (Exh. 6, R.T. 564-624.)

The other official action advanced by petitioner which related to its property was an action by the Local Agency Formation Commission (LAFCO), denying annexation of a portion of RLC's property to the City of Carlsbad on December 4, 1972. Such action was not an action of the County since LAFCO is an independent local agency.

2. ACTIONS NOT TAKEN BY THE COUNTY

It is instructive in this case to consider the actions the County *has not* taken with regard to RLC's property:

(a) There has been no down-zoning or other restrictions on the existing use of the property. The zoning on the property has not changed and is a type of zoning which RLC requested and agreed with (R.T. 173).

(b) There has been no application by RLC for any rezone, special use permit, conditional use permit, tentative map, final map, building permit, or any other permit applicable to its property at any time in this case, thus there has been no denial by the County of any applications filed by RLC (F.F.12; C.T. 171).

---

[1]Respondent will use the same abbreviated references as petitioner.

(c) There has been no announcement, formal or informal, by the County of an intention to condemn RLC's property.

3. SUMMARY OF THE EVIDENCE

(a) The Property and its Ownership.

RLC's property lies on the California coast and consists in part of a coastal lagoon known as Batiquitos Lagoon, which is recognized as an ecologically sensitive area, an important wildlife habitat, and a potential marine life habitat. The portions of Exhibit 55 quoted by petitioner wherein the lagoon is described was not related to any potential acquisition of property for a regional park, but was an interdepartmental memorandum concerning the possible securing of grant funds for a resource conservation project to stop erosion and siltation of coastal lagoons in the County. The memo was written in 1976.

(b) RLC's Use of the Subject Property and its Efforts to Devote it to a Reasonable, Beneficial and Economic Use.

RLC's property was zoned A-1(8), an agricultural zone which allowed one dwelling unit per eight acres, and a zoning which was requested by RLC (R.T. 119, 120). RLC never requested a change of the zone and voluntarily elected to utilize only a small portion of its total property for farming purposes. It did not develop the property consistent with the zoning or the General Plan. The General Plan at all times allowed .75 to 3.3 dwelling units per acre (Exh. B), and RLC could have applied to develop the property consistent with the General Plan and request a rezone that would be consistent with the General Plan. RLC never filed an application to devote its property to a use more beneficial than farming, even though it could have. The majority of RLC's property went vacant and undeveloped even

though the zoning and General Plan allowed for more intense use.

RLC's comparison of income from farming and taxes paid is misleading in that the taxes shown are for its total ownership of 1980 acres; whereas, the farming income was only from 265 acres of its total ownership.

RLC sold a portion of its property (830 acres) to a neighboring development (La Costa Resort and Country Club) and testified that it could have sold the remaining property in separate parcels and that there were plenty of buyers for the property (R.T. 252-254).

(c) The Proposed Batiquitos Lagoon Regional Park.

There is no evidence that the County's Board of Supervisors informally adopted a policy that its planning department would not accept any applications for rezoning or special use permits from RLC. RLC's reference to the record does not support its statement of the evidence since it refers to a document marked as an Exhibit which was rejected by the Court as evidence (R.T. 26; C.T. 554) and refers to an assertion by RLC's attorney which is not evidence (R.T. 205). The March 1971 denial of a rezone request concerns commercial property far removed from the subject property. It was a request for a special use permit and a rezone for a trailer park from an existing commercial zone. RLC, as well as all property owners, have a right to submit an application upon payment of the prescribed fees, and RLC has never identified a County official, a specific date, or any other evidence to support its assertion of such an informal policy to preclude applications from being filed.

There is no evidence that RLC could not have developed its property without its annexation to the City of Carlsbad, and the

Court of Appeal rejected such a contention. RLC refers to the testimony of the appraisers in the valuation trial concerning highest and best use, however, the appraisers highest and best use was for a very high density residential development. The appraisers did not conclude that annexation to the City of Carlsbad was necessary for any development, but that it may be necessary for such highest and best use or high density development. (Val. R.T. I 315-319, II 199). The evidence shows that other less dense development could have occurred without annexation and that prior to 1970, RLC could have connected to the sewer in a County sanitation district, and after 1970 could have negotiated an agreement for joint use of the City of Carlsbad's facilities (R.T. 347-349). Furthermore, a neighboring development, the Rancho La Costa Country Club, did develop a high density project without annexation (R.T. 105). The proposed density for RLC's property on its master plan was 45,126 population and such a highest and best use would probably not even be accepted by the City of Carlsbad. The letter of December 1, 1970, referred to by RLC indicates that even the City of Carlsbad objected to such a high density and large development on the city's boundaries. The letter did not state that the land could only be developed in the City (Exh. 2). Even upon annexation, the City of Carlsbad indicated that it would place the property in a holding zone for future master planning and rezoning (Exh. 16).

The evidence surrounding the Board of Supervisor's acceptance of the RPIS shows that the Board gave direction to specifically plan, acquire, and develop the various potential regional parks in the County as funding permitted (Exhs. 6 and 6A). Such precise planning, acquisition and development has never occurred, since the funding for the proposed Batiquitos Lagoon Regional Park never materialized. RLC refers to Exhibits 7 and 18 and asserts

that the County ordered the acquisition by 1978 of Batiquitos Lagoon Regional Park. The above Exhibits do not even refer to the subject property, but refer to a State-owned freeway rest stop property, which will be referred to hereinafter. RLC also refers to Exhibit 4 and misstates the contents of that document in that the City of Carlsbad recommended exactly what the General Plan 1990 recommended. The County's response was not inconsistent since the County recommended public ownership qualified with the statement that at the precise planning stage, it would be appropriate to involve private property owners to assist in the development of any park. But as noted, the precise planning stage was never reached with regard to this potential regional park since it was contingent upon future funding. In the Board's acceptance of the RPIS, it directed the initiation of precise planning which must precede acquisition and development, and the precise planning did not materialize with regard to Batiquitos Lagoon. The RPIS is properly characterized as a schematic concept study only and illustrates that it is merely the initial and early planning actions of the County (Exhs. 6 and 6A).

With regard to the actions of County officials concerning RLC's application for annexation made to LAFCO, RLC misstates the evidence. The response of the County Planning Department was to recommend denial of annexation based upon five separate reasons consitent with the considerations required of LAFCO under California law, and only one reason referred to potential park sites (Exh. 10). The response from the County Public Works Administrator included a map from the RPIS showing the initial planning and further stated that "the funds were not in sight" (Exh. 12). Exhibit 12 did not conclude that this site should be retained in the County for the County regional park system, but merely advised LAFCO of the status of planning

for the proposed park. There is no evidence that one member of the Board of Supervisors stated that the annexation should be denied so that the potential park property would be cheaper to buy. The citation to the record does not support such evidence (C.T. 657-659). Notwithstanding the lack of evidence, such a statement, if it were made, is not a statement or official action of the County or the Board of Supervisors. The actions of LAFCO on both October 2, 1972, deleting parcel C from annexation, and on December 4, 1972, deleting parcel A from annexation, were unanimous votes of LAFCO and the December 4 motion was not even made by a member of the County Board of Supervisors. The two Board of Supervisors members on the LAFCO Commission are not a majority of LAFCO which has seven Commissioners, and LAFCO is an independent entity (Exhs. 72 and 73). There is no evidence, as asserted, that Supervisor Craven of the County stated that the area within the proposed Batiquitos Lagoon Regional Park should not be annexed to the City of Carlsbad. RLC's own representative stated at the LAFCO hearing that RLC agreed with the proposed regional park and had no objection to the park (Exh. 73).

RLC's contentions that it could not sell its property because of the proposed County park is contrary to the evidence where RLC testified that the existence of a potential regional park had no effect upon potential purchasers of its property (R.T. 64, lines 22-24).

(d) The Batiquitos Lagoon Regional Park and the State-Owned Property.

The actions of the County with regard to the State's surplus property were limited to such property and did not relate to or affect RLC's property. The total evidence concerning the

County's actions in regard to the State property places its action into context in that the State was insisting that the property had a higher value based upon a highest and best use of commercial; whereas, the County was urging a lower value based upon the existing zoning and the County was attempting to inform potential purchasers of the surplus property as to what its highest and best use would be (Exhs. 7, 13, 19 and 24). The Board of Supervisors resolution (Exh. 23) was to further inform the public concerning the potential highest and best use of the surplus property and solely related to the State parcel and not to any of RLC's property.

(e) The Trial Court's Findings.

As recognized by the Court of Appeal, the trial court's findings referred to by RLC is not supported by the evidence.

LAFCO is an independent and separate legal entity and the two Board of Supervisors' members do not control LAFCO's actions whose votes to deny annexation were unanimous. The Court of Appeal correctly concluded that LAFCO's actions do not bind the County. The recommendations of the County's Planning Department and Public Works Administrator to LAFCO were required by State law since they were informing LAFCO of the status of planning in the area of the proposed annexation.

There is no evidence that the Board of Supervisors of the County, in 1972, took any official action to block the economic beneficial use of RLC's property so that it could be acquired as cheaply as possible.

There is no evidence to support the conclusion that it was impossible for RLC to develop its property to any use other than farming as it never submitted any development proposal consistent with the zoning or the general plan to the County. In

addition, RLC requested the existing zoning on the property and never asked for it to be changed. The evidence shows that the property could have been developed to a less dense usage than RLC's ultimate desires without annexation to the City of Carlsbad.

There is no evidence to support the conclusion that the property could not be developed unless it was annexed to the City of Carlsbad since, if sewer service was not available, the property could have been developed with septic systems, and the evidence shows that other services were available in the County and that a neighboring large development secured the necessary services through a bond issue without annexing to the City of Carlsbad.

There is no evidence that RLC was denied reasonable beneficial use of the subject property because of the Board of Supervisors' acceptance of the RPIS on April 19, 1972. In fact, RLC has always contended that the property was denied such use later in time, on December 4, 1972, upon the denial of annexation by LAFCO, which is inconsistent with the trial court's own findings.

There is no evidence to support the conclusion that on April 19, 1972, the County ordered acquisition of the subject property since it merely accepted a schematic study (RPIS) and ordered precise planning initiated and later acquisition and development if funds permitted.

The cumulative evidence in the case does not show a "taking" of RLC's property, but illustrates legitimate planning activities by the County. The County never arrived at a decision to acquire or condemn any of RLC's property. There has been no precise planning, or acquisition activity to date, and no such intention to proceed in those areas since the funding has never become available.

SUMMARY OF ARGUMENT

1. The decision below is consistent with the "taking" jurisprudence of this Court since there was no official governmental conduct here which resulted in a taking of private property under the Fifth Amendment.

2. The decision below does not raise a question concerning the inverse condemnation remedy in California since the decision was not based upon the vitality of such remedy, but expressly found that the facts did not constitute a "taking." This Court's decision in the San Diego Gas & Electric Company case has no effect on the decision below.

ARGUMENT

I

THE DECISION BELOW IS CONSISTENT WITH THE "TAKING" JURISPRUDENCE OF THIS COURT SINCE THERE WAS NO OFFICIAL GOVERNMENTAL CONDUCT HERE WHICH RESULTED IN A "TAKING" OF PRIVATE PROPERTY.

Petitioner has cited five important decisions of this Court wherein the "taking" issue was before the Court. A proper reading of these decisions illustrates the consistency of the decision below with the taking jurisprudence of this Court, and the decisions are contrary to petitioner's position advanced herein.

In *United States* v. *Dickinson* (1947) 331 U.S. 745, this Court held that where government brings about a taking by a continuing process of physical invasions of private property by permanent flooding and erosion, the Fifth Amendment requires compensation for such taking. In the case at bar, there has been no physical invasion or intrusion of RLC's property by the County. It should

be noted that RLC's quote from the *Dickinson* case is misleading in its incompleteness as this Court stated at page 748:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

A proper application of that test to the facts hereinbefore presented in the case at bar shows that there has been no taking by the County.

In *Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393, this Court held that when a police power regulation restricting the use of private property goes too far, it will be recognized as a taking. In that case the police power regulation was a Pennsylvania State Statute restricting the mining of coal on private property. In the case at bar, there has been no police power regulations enacted by the County, affecting RLC's property, thus the *Pennsylvania Coal* case does not support RLC's contention of a "taking." In addition, it is important to note that this Court in *Pennsylvania Coal* held, at page 416, that a "taking" will depend upon the facts, as it is a question of degree and that such cases cannot be disposed of by general propositions. This Court made the same observation in its more recent case of *Penn Central Trans. Co.* v. *New York City,* (1978) 438 U.S. 104, which will be referred to hereinafter. It is also important to note that this Court did not rule that compensation must be paid for the taking in the *Pennsylvania Coal* case, but that the State regulation must fall as it conflicted with the Fifth Amendment.

In the case of *Penn Central Trans. Co.* v. *New York City, supra,* this Court more recently expanded upon the "taking" jurisprudence under the Fifth Amendment by finding that the regulation of the City of New York did not amount to a taking,

since it did not interfere with the owner's present use of the property, it did not necessarily prohibit the highest and best use of the property, and it did not deny all uses for the property. In the case at bar, there was no governmental regulation applied to RLC's property. But by applying this Court's conclusions in the *Penn Central* case to the cumulative planning actions of the County in this case, it is clear that there is no "taking" as the County's actions did not interfere with RLC's present use of its property which was farming, the County's actions did not prohibit the highest and best use of RLC's property, and the County's actions did not deny all uses of RLC's property.

This Court, in *Penn Central* at Page 124, identified two factors of particular significance in determining whether or not governmental action amounts to a "taking." The first factor is the economic impacts of the regulation and particularly the extent to which it has interfered with distinct investment-back expectations, and the second factor is the character of the governmental action. This Court went on to further delineate the type of economic impacts and governmental actions which would *not* give rise to a "taking" as the Court observed:

> "A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.
>
> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," [citation omitted] and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." (438 U.S. 104 at 124.)
>
> ". . . the submission that appellants may establish a "taking"

> simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." (438 U.S. 104 at 130.)

No action of the County in this case can be characterized as a physical invasion of RLC's property. The governmental action here involves long-range planning for future public regional parks in accordance with the County's General Plan. The California Supreme Court has held that such planning actions of government and its effect on property does not give rise to liability in inverse condemnation (*Selby Realty Co.* v. *City of San Buenaventura* [1973] 10 Cal.3d 110; *Agins* v. *City of Tiburon* [1979] 24 Cal.3d 266). This is consistent with this Court's view as expressed above in *Penn Central.*

As to the economic impact and reasonable expectations, RLC's contention is that it could not develop its property to its ultimate high and best use (very high density residential) as a result of the denial of annexation to the City of Carlsbad. The governmental action there was LAFCO and not the County, but despite that fact, this Court's holding in *Penn Central* above is that such expectation is unreasonable and the denial of the ability to exploit its property as RLC desired is untenable as a basis to establish a "taking." That such an expectation to exploit is unreasonable is further reinforced here because of the characteristics and location of RLC's property, which is part of and surrounds a coastal lagoon.

In the case of *Agins* v. *City of Tiburon,* (1980) ..... U.S. ....., 100S.Ct. 2138, 65 L.Ed.2d 106, this Court observed that appellants there were free to pursue their reasonable investment expectations by submitting a development plan to local officials. The same is true in the case at bar in that RLC was free to pursue

its reasonable investment expectations by submitting a development plan to the County and it neglected to submit such a plan to the appropriate County officials for acceptance or rejection. As this Court pointed out in *Agins,* when a property owner has not submitted a plan for development of their property as local ordinances permit, there is as yet no concrete controversy regarding the application of the local agencies' regulations (*Agins* v. *City of Tiburon, supra,* 65 L.Ed.2d 106, at 111). The same principle would apply in the case at bar since RLC did not submit a plan for the development of its property, thus there is no concrete controversy regarding the County's actions with regard to development of RLC's property. Furthermore, as this Court pointed out in *Agins,* the general impact of land use regulations does not deny the justice and fairness guaranteed by the Constitution.

Finally, RLC cites the case of *United States* v. *Causby,* (1945) 328 U.S. 256, to support its contention that the County took its property by its planning activities. RLC's reliance upon *Causby* is misplaced since that case involved a physical invasion and direct appropriation of an owner's property because of low overflights of aircraft. This Court found a taking in *Causby* because the overflights were so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the owner's land and in effect a direct appropriation of the land. No such facts are present in the case at bar.

As can be seen from the principles enunciated by this Court in the above cases, the actions of the County that are substantiated by the evidence in this case did not amount to a "taking" under the Fifth Amendment. There has been no physical invasion or direct appropriation of RLC's property by the County as in *Dickinson* and *Causby,* and there has been no police power

regulation or other restriction on the use of RLC's property enacted by the County as in *Pennsylvania Coal, Penn Central,* and *Agins.* Thus the above decisions are not authority to find a "taking" in the case at bar and the decision below is consistent with the "taking" jurisprudence enunciated by this Court in the above cases.

The County did not take any action in this case to preclude RLC from effectively and reasonably using its property and the actions of LAFCO in denying annexation of RLC's property are not actions of the County. RLC could have challenged the action of LAFCO by seeking court review of the denial annexation, but failed to do so. It is important to note that the facts in the case at bar most nearly parallel the facts in a recent Court of Appeal decision in California in *Briggs* v. *State of California* (1979) 98 Cal.App.3d 190, wherein the California courts rejected inverse condemnation liability and this Court declined to review the case (cert. denied, 100 S.Ct. 3005; 65 L.Ed.2d 1109). In that case, the State of California engaged in long-range planning activities with regard to a future state park and the independent California Coastal Commission denied a development permit for the property based upon the State's interest in acquiring the property for park purposes. In addition, the State engaged in extensive precondemnation activities which are not present in this case. The Court of Appeal rejected any liability in inverse condemnation. Thus, the facts in the *Briggs* case go much further than the case at bar, yet the court found no "taking" or liability in inverse condemnation. In the case at bar, the County never did form a firm intent to acquire any of RLC's property for the proposed Batiquitos Lagoon Regional Park, but only engaged in initial planning activity and advised other entities of the status of its planning activities. Such activity does not

even approach the type of impacts on private property that are necessary for there to be a "taking" under the Fifth Amendment to the United States Constitution.

II

THE DECISION BELOW DOES NOT RAISE A QUESTION CONCERNING THE AVAILABILITY OF THE INVERSE CONDEMNATION REMEDY IN CALIFORNIA.

RLC incorrectly asserts that the decision below raises a question concerning the continued vitality of the inverse condemnation remedy in California. The decision below, in concluding that there was no taking, did not rely upon that portion of the California Supreme Court's holding in *Agins* v. *City of Tiburon* (1979) 23 Cal.3d 266, wherein it was held that the invalidation of a zoning or planning regulation through mandamus or declaratory relief was the proper remedy rather than the damage remedy of inverse condemnation in cases where government regulatory action exceeds permissible Constitutional limits. To the contrary, the decision below is based on established California decisional law and this Court's views in *Agins*. The Court concluded that the actions of the County did not have a constitutionally impermissive effect on RLC's property and there was no taking in inverse condemnation. The Court's decision was not based on the availability or unavailability of the inverse condemnation remedy in California. Thus, the petitioner herein is requesting this Court to decide a question not properly raised by the decision below in this case.

RLC also refers to the "pending decision" of this Court in *San Diego Gas & Electric Company* v. *City of San Diego* (No. 79-678) and its effect on the petition herein. This Court has now rendered its opinion in *San Diego Gas* (decided March 24, 1981),

and that decision has no bearing on RLC's petition. In the *San Diego Gas* case, this Court declined to review the matter since there had been no final judgment in the California Courts and no final determination as to whether there was a "taking" in that case. In this case, however, there has been a final judgment that there was *no taking,* and such decision is supported by both California law and this Court's decisions.

III

CONCLUSION

Since the actions of the County in this case do not rise to a "taking" under the Fifth Amendment to the United States Constitution as enunciated by this Court, and the decision below is consistent with both California and Federal decisional law in the "taking" area, this Honorable Court should exercise its discretion to determine not to review the decision below. There is no substantial Federal issue raised by the facts in this case and the decision of the California Court herein is not contrary to Federal law. Therefore, the County of San Diego respectfully requests that the petition should be denied and the judgment of dismissal be affirmed.

DATED:

Respectfully submitted,
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IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1980

NO. 80-1505

RANCHO LA COSTA,

Petitioner,

vs.

COUNTY OF SAN DIEGO,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this MAR 31 1981 C.R. day of April, 1981, three copies of the Respondent's Brief In Opposition to The California Court of Appeal, Fourth Appellate District, Division One were mailed, postage prepaid, to each of the following named persons:

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I further certify that all parties required to be served have been served.

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